United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7635

ORIGINAL

To be argued by
RENEE MODRY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATHANIEL COOPER,

Plaintiff-Appellant,

GUARDS: DOYLE OGLESBY and STEVEN DAVIS,

Defendants,

and

CITY OF NEW YORK; DEPARTMENT OF SOCIAL SERVICES: CORPORATION COUNSEL: and MRS. CUDSOUL, Supervisor, Department of Social Services, 330 Jay St., Brooklyn, New York,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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-against-

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Preliminary Statement

In this pro se civil rights action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 for recovery of punitive and compensatory damages, plaintiff appeals from an order and judgment dismissing the complaint against the defendants Doyle Oglesby and Steven Davis, entered on October 20, 1975, upon a jury verdict in the United States District Court for the Southern District of New York (BONSAL, J.). Plaintiff's claim arises out of an alleged assault claimed to have been committed on or about December,

19, 1972 by Oglesby and Davis, guards in the City's Department of Social Services.

Plaintiff's prior appeal from a decision rendered on December 6, 1974 (BONSAL, J.) granting summary judgment to defendants The City of New York, the New York City Department of Social Services, the City's Corporation Counsel and Mrs. Cudsoul, a Department of Social Services supervisor was dismissed on June 11, 1975, because no order had been entered by the District Court and because an order would not be appealable until disposition of the action as to defendants Oglesby and Davis. The judgment dismissing the "attempted appeal" provided that it "does not affect plaintiff-appellant's right to appeal from any final order entered by the District Court after disposition of the action as to all parties."

We submitted an order to the District Court and understand that it either has been or shortly will be entered. Accordingly, we assume the appeal is now properly before this Court.

Issues Presented

1. May the Court consider plaintiff's claims of reversible error in the trial proceedings below where plaintiff has failed to submit a record of such proceedings?

2. Does plaintiff state a cause of action for damages against New York City, its agencies and one of its supervisors for violation of his civil rights?

The Facts

The complaint, which is somewhat confusing, appears to allege that plaintiff was the victim of a robbery and beating on December 19, 1972, while in or about an office operated by the Department of Social Services of the City of New York. Plaintiff further alleges that he was lawfully entering the building in order to seek public assistance when his entry was barred by guards. According to the complaint, the guards beat the plaintiff and robbed him of $10.00.

On or about August 2, 1973, the City served an answer. On November 18, 1973, Judge Bonsal denied plaintiff's motion for a default judgment, which motion was based on the fact that the answer had been served a few days late, and granted the defendants' motion for an extension of time to answer to August 2, 1973.

On October 18, 1974, plaintiff was orally deposed by defendants. At that time plaintiff indicated the theories upon which he believed the City, the Corporation Counsel, and the Department of Social Services could be found liable. According to plaintiff these defendants were liable on the legal theories of

respondeat superior and principal and agent:

"Q. Your theory of law, under which you name the Department of Social Sevices and the Corporation Counsel of the City of New York, is the theory of respondeat superior ?

A. Yes." (page 13)

* * *

"Q. In what way did the Corporation Counsel violate any of your constitutional rights?

A. Cudsoul [a Department of Social Services supervisor] were employed, Cudsoul and three other defendants were employed by the Department of City Social Welfare. The general rule is that the master is liable for all acts of his servant done in the scope and course of the employment. The doctrine here involves his call. The doctrine here is called respondeat superior, Wallis vs. Parlor, 137, New York, Sydenham vs. Morris. In the practical result, the same rules govern torts, liability of principal and agent." (page 16)

* * *

"Q. As to those matters, I haven't taken any action, but the main reason that I wanted to examine you today, was to determine and have you put on the record, your theory under which you sued the Department of Social Sevices and the Corporation Counsel, and the other named defendants, that's Davis and the others that you stated, but I'm concerned mainly with the

Department of Social Services and the Corporation Counsel, and it's your statement that you're suing them under the theory of respondent superior, that the master is responsible for the acts of the servant.

A. As well as agents and principle, such as Corporation Counsel and Department of Social Services, agent and principle." (page 24)

On November 11 1974, the defendants City of New York, Corporation Counsel and Department of Social Services moved to dismiss the complaint or, in the alternative, for summary judgment. On December 6, 1974, Judge Bonsal granted summary judgment to the above named defendants and to Mrs. Cudsoul, a supervisor at the Department of Social Services, whom Judge Bonsal had agreed on November 11, 1974 to treat as a defendant in this action. The Court in its decision found no material issues of fact to exist as to any of these four defendants. Moreover, as to the City, Corporation Counsel and Department of Social Services, the Court ruled that it had no subject matter jurisdiction because neither the City nor its agencies are "persons" within the meaning of Section 1983. The court further found that the doctrine of respondeat superior did not suffice to hold the defendants liable because some personal responsibility of the defendants must be demonstrated in order to hold them liable for monetary damages under §1983. Judge Bonsal's decision is reproduced as an appendix to this brief.

On or about January 21, 1975, defendants Oglesby and Davis served their answer and demanded a jury trial. Trial convened on October 16, 1975 and ended on October 17, 1975, when the jury returned a verdict in favor of defendants Oglesby and Davis.

POINT I

PLAINTIFF HAS FAIED TO DEMONSTRATE ANY GROUNDS FOR REVERSAL OF THE JUDGMENT AFTER A JURY TRIAL, DISMISSING THE COMPLAINT AGAINST DEFENDANTS OGLESBY AND DAVIS.

Plaintiff's brief appears to urge that his claim against Social Services guards Oglesby and Davis for violation of his civil rights was not fairly tried. As grounds for reversal, plaintiff complains that neither he nor his lawyer was present at the beginning of a pre-trial hearing; he received only one week's notice to appear for the hearing held on September 9, 1975; the District Judge refused his request for adjournment of the trial to November, 1975 (the trial was held on October 16 and October 17, 1975); there were no black jurors; the judge refused to allow plaintiff to refer to the September 9, 1975 hearing at the trial; the judge did not permit plaintiff to read to the jury or to show them "any statement of my legal papers or motions"; the judge refused to allow Oglesby to answer why he did not show up to explain the assault on plaintiff; the judge refused to permit plaintiff to further question Oglesby on the second day of the trial.

Neither an appendix nor a transcript of the trial in the District Court has been submitted by the plaintiff and his request for transcription of the minutes at the expense of the United States was denied by this Court.

Rule 10 (b), Fed. R. App. P., makes it the "Duty of Appellant to Order *** a transcript of such parts of the proceeding not already on file as he deems necessary for inclusion in the record." Since the burden of showing error is upon the appellant, he must show by reference to the record, not merely by assertion, the basis for his claim of error. L & E Co. v. U.S.A., 301 F. 2d 880, 883 (9th Cir. 1965). "Unless the record that he brings before the court of appeals affirmatively shows the occurrence of the matters upon which he relies for relief, he may not urge these matters on appeal." 9 Moore's Federal Practice, ¶210.05 [1] at 1618. Plaintiff's claims of erroneous rulings must be supported by those portions of the transcript as show his offer of proof or his objection to admissibility. "Regardless of the flexibility of the rules of Civil Procedure *** one thing is certain, *** error cannot be claimed as to trial court procedure nor rulings made as to the admission of evidence absent some showing of the character and circumstances under which such a ruling has been made." Andrews v. Olin Mathieson

Chemical Corporation, 334 F. 2d 422 (8th Cir. 1964).

Thus, the Court in Del Rey Air v. Expressway AirPark, Inc. 468 F. 2d 187, 189 (10th Cir. 1972), refused to consider whether the District Court committed error in not granting a continuance a few days before trial where there was nothing in the record to show that such a request had been made. Here, there is not only no record of the request for an adjournment, but also no showing that plaintiff was unfairly prejudiced when the trial date was set for October 16, 1975. See also, In Re Charmar Investment Company, 501 F. 2d 1349 (6th Cir. 1974), where the Court refused to find error in the trial judge's failure to direct a verdict and in refusing to admit testimony of a witness where tnere was no record of such requests by the appellant or of the trial court's refusal.

The same rule applies to plaintiff's claim that the jury was biased because none of its members was black. There is no record of the racial composition of the jury or of plaintiff's objections to the composition of the jury. Indeed, even assuming plaintiff could show that there were no blacks on the jury and that he objected to their absence, this would not be enough to show a constitutional deprivation in the absence of proof of purposeful and intentional discrimination. Fay v. New York, 332 U.S. 261, 284 (1974); Swain v. Alabama, 380 U.S. 202 (1965). The Constitution

does not require proportional representation by race or any other grouping. United States v. Curry, 358 F. 2d 904, 917 (2d Cir. 1966).

It is essential that plaintiff show by the record that errors complained of actually happened. 9 Moore's Federal Practice, supra, ¶210.05 [1] at 1621. This has not been done. Plaintiff's failure to supply a record showing the alleged errors requires that the jugment be affirmed.

POINT II

THE DISTRICT COURT PROPERLY DETERMINED THAT PLAINTIFF'S CAUSE OF ACTION COULD NOT BE MAINTAINED AGAINST NEW YORK CITY, AND ITS AGENCIES UNDER 42 U.S.C. §1983. IN ANY EVENT, PLAINTIFF'S CAUSE OF ACTION AGAINST THE CITY AND THE AGENCIES AND EMPLOYEES MUST BE DISMISSED ON THE BASIS OF THE JURY VERDICT IN FAVOR OF DEFENDANTS OGLESBY AND DAVIS.

Judge Bonsal's decision clearly shows why, under the applicable authorities, the plaintiff's Section 1983 action should be dismissed as against the defendant the City of New York, and its agencies. Indeed, this Court has recently reaffirmed that municipalities and their agencies are not "persons" within the meaning of Section 1983. Monell v. Department of Social Services of the City of New York, Slip op. 2409 (2d Cir. March 8, 1976).

Moreover, even in cases where a defendant is a "person" within the meaning of §1983, he cannot be held liable for monetary damages on the theory of respondeat superior. Some showing of personal responsibility is required to find liability. Johnson v. Glick, 481 F. 2d 1028 (2nd Cir., 1973), cert. den. 414 U.S. 1033; Jennings v. Davis, 476 F. 2d 1271 (8th Cir., 1973); Schumate v. People of State of New York, 373 F. Supp. 1166 (S.D.N.Y., 1974); Mukmuk v. Commissioner of Correctional Services, 369 F. Supp. 245 (S.D.N.Y., 1974); Nugent v. Sheppard, 318 F. Supp. 314 (N.D., Ind., 1970). Because it has not been alleged, and indeed, it is logically impossible to show that the City of New York, a municipal corporation and its govenmental agencies are peronally responsible for plaintiff's alleged injuries, the defendants were properly granted summary judgment herein.*

Nor may plaintiff reasonably argue at this stage of the proceedings that New York City and its agencies may be liable for damages in a cause of action founded directly on the 14th Amendment, assuming

*The Court below also granted summary judgment to Mrs. Cudsoul whom the plaintiff had originally failed to make a party to this suit. Judge Bonsal held that plaintiff had failed to allege any specific acts by her which deprived him or caused him to be deprived of his civil rights. In so far as plaintiff may suggest that she is liable, as a supervisor, on the basis of respondeat superior, the argument made above would apply.

that jurisdiction is premised upon 28 U.S.C. §1331 [which is not the case here]. The dismissal of the complaint against Oglesby and Davis, upon a jury verdict obviously precludes liability by those allegedly responsible for their supervision.

CONCLUSION

The Judgment Appealed From Should Be affirmed.

April 14, 1976

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
of the City of New York,
Attorney for the Appellees.

L. KEVIN SHERIDAN,
RENEE MODRY
of Counsel.

APPENDIX

Decision Below

Bonsal, D.J.

Plaintiff, pro se, commenced this civil rights action under 42 U.S.C. §1983 and 28 U.S.C. §1343 for recovery of compensatory and punitive damages against Doyle Oglesby, a guard for the Department of Social Services until approximately March 1973, the Department of Social Sevices ("DSS"), the City of New York, and the "Corporation Counselor, Municipal Building." The City of New York, DSS and the Corporation Counsel move to dismiss the complaint pursuant to F.R.Civ.P. 12 or, in the alternative, for summary judgment pursuant to F.R.Civ.P. 56.

At argument on this motion on November 11, 1974, the Court granted plaintiff's motion to treat the complaint as amended to include as defendants Mrs. Cudsoul, the supervisor at the DSS office, 330 Jay Street, Brooklyn, and Guard Steven Davis. Defendants' motion shall apply with equal force to the complaint as amended as aforesaid.

The Court has considered plaintiff's deposition upon oral examination taken on October 18, 1974 and the affidavits submitted by the parties. The Court finds no material issues of fact exist as to the City, DSS, the Corporation Counsel and Mrs. Cudsoul.

From the papers submitted, it appears that plaintiff alleges that on December 19, 1972, while he

was at the "Medicade Building" at 330 Jay Street, Brooklyn, for the purpose of discussing his welfare status, he was beaten without just cause, robbed and falsely arrested by Guards Oglesby and Davis. Plaintiff alleges that he was hit on the head with a night stick, rendering him unconscious and causing him to suffer five stitches in his left forehead. Plaintiff further alleges that while he was in handcuffs he was hit in the nose and mouth by Guard Davis, requiring him to undergo dental work and causing him pain and suffering. Finally, plaintiff alleges that he was robbed of $10.00 and eight subway tokens. Plaintiff appears to seek compensatory and punitive damages in the amount of $50,000.00.

Turning to defendants' motion, plaintiff's claims for damages under 42 U.S.C. §1983 against the City of New York, DSS and the Corporation Counsel must fail because this Court has no subject-matter jurisdiction. Neither a municipality nor its governmental agencies are "person[s]" within the meaning of section 1983. Monroe v. Pape, 365 U.S. 167 (1961); Zuckerman v. Appellate Division, Second Department, Supreme Court of the State of New York, 421 F. 2d 625 (2 Cir. 1970).

Plaintiff contends that the defendants are liable under the doctrine of respondeat superior for the acts of the Guards Oglesby and Davis. However,

the rule in this circuit is that where monetary damages are sought under section 1983, the general doctrine of respondeat superior does not suffice and a showing of some personal responsibility of the defendant is required. Johnson v. Glick, 481 F. 2d 1028, 1034 (2d Cir. 1973). Plaintiff's deposition shows no personal responsibility on the part of any of the defendants except Guards Oglesby and Davis. Moreover, plaintiff does not allege any actions by Mrs. Cudsoul which deprived him or caused him to be deprived of his civil rights. See Johnson v. Glick, supra, and cases cited therein. Plaintiff therefore fails to assert any cognizable federal claim against her.

Accordingly, the motion for summary judgment as to the City of New York, DSS, the Corporation Counsel and Mrs. Cudsoul must be granted.

Neither Guard Oglesby no Guard Davis has appeared in this action, and the file does not indicate that they have been served. See F.R.Civ P. 4(c). The United States Marshal is directed to effect service of the summons and complaint on Guards Oglesby and Davis at their last address, to be furnished by the Department of Social Services.

Settle order on notice.

AFFIDAVIT OF SERVICE ON ~~ATTORNEY~~ BY MAIL

State of New York, County of New York, ss.:

James - Burns being duly sworn, says that on the 14 day of Apr 1976, he served the annexed Brief upon Nathaniel Cooper ~~Esq.~~, the ~~attorney~~ for the Pet. herein by depositing ~~a~~ 3 copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said ~~attorney~~ at No. 372 - Pacific Ave in the Borough of Bklyn, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

17 day of Apr. 1976

James Burns

Renee Rodney

RENEE RODNEY
NOTARY PUBLIC, State of New York
No. 31-0736050
Qualified in New York County
Commission Expires March 30, 1977

Form 323-50M-701067(75) 346